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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 184.

MARCELINO GARCIA and VICTOR ALVAREZ, as Executors of the Last Will and Testament of Manuel Diaz, Deceased, EDITH GILMOUR DIAZ, MARY ADELA EADS and MANUEL DIAZ, JR.,

Petitioners,

—against—

PAN AMERICAN AIRWAYS, INC.,

Respondent,

and

R. O. D. SULLIVAN,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, WESTCHESTER COUNTY, AND BRIEF IN SUPPORT THEREOF.

FRANCIS X. NESTOR,
Attorney for Petitioners.

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IN THE

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No. .

MARCELINO GARCIA and VICTOR ALVAREZ, as Executors of the Last Will and Testament of Manuel Diaz, Deceased, EDITH GILMOUR DIAZ, MARY ADELA EADS and MANUEL DIAZ, JR.,

Petitioners,

—against—

PAN AMERICAN AIRWAYS, INC.,

Respondent,

and

R. O. D. SULLIVAN,

Defendant.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Westchester County.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

Marcelino Garcia, surviving executor of the Last Will and Testament of Manuel Diaz, deceased, and Edith Gilmour Diaz, Mary Adela Eads and Manuel Diaz, Jr., respectfully renew their prayer that a writ of certiorari issue to review the final order of the Court of Appeals of the State of New York entered herein on the 14th day of April, 1949, and the judg-

ment entered thereon in the Office of the Clerk of the Supreme Court of the State of New York, Westchester County, on the 5th day of May, 1949.

The original petition was denied "for the want of a final judgment". *Marcelino Garcia, et al.* v. *Pan American Airways, et ano.*, 329 U. S. 741. A final judgment has now been entered herein and the petitioners have completely exhausted the remedies available to them within the State of New York.

Statement of the Matter Involved.

On February 22, 1943, Manuel Diaz, a citizen of the United States and a resident of the State of New York, was killed at Lisbon, Republic of Portugal, in the crash of the aircraft "Yankee Clipper", owned and operated by the respondent. On February 1, 1944, the petitioners, who, other than the executor, are the surviving widow and children respectively of Manuel Diaz, commenced an action in the Supreme Court of the State of New York, Westchester County, against the respondent as the owner and operator of the aircraft, and R. O. D. Sullivan, the pilot, to recover damages resulting from the death of Mr. Diaz, aggregating $777,745.64. Prior to the institution of suit, Mr. Sullivan left the jurisdiction of the State and has not been served with process. The respondent appeared generally in the action.

The petitioners are citizens of the United States and residents of the State of New York. The respondent was and still is a corporation organized under the laws of New York and domiciled in that State, and at all times material hereto was engaged in business as a common carrier by air of passengers and goods (fols. 45, 77, 80).

At the time of the decedent's death, the laws of the Republic of Portugal afforded a right of recovery, without predetermined limitation of amount, to the next of kin in cases involving negligent death, and rendered the owner and operator of aircraft presumptively liable for full damages (fol. 51).

The complaint in the action alleged two causes of action in favor of each of the next of kin to recover damages resulting from the death of Manual Diaz, predicated upon the law of the Republic of Portugal, the first of each respective cause of action being based upon the presumptive liability of the respondent, and the second upon its actual negligence (fols. 43-66). A seventh cause of action based upon the loss of the decedent's baggage and personal effects (fols. 68-74) has been settled.

The answer interposed by the defendant (fols. 76-121) admitted its status of common carrier, ownership, operation and control of the aircraft, the crash at Lisbon and the resultant death of Manual Diaz, but denied the law of Portugal as pleaded in the complaint, and its negligence as therein alleged. In addition, the respondent set up three affirmative defenses based upon a certain "Convention for the Unification of Certain Rules Relating to International Transportation by Air, Warsaw, 1929" (49 U. S. Stat. Part II, page 3000), hereinafter referred to as the "Convention". It contended that its liability for decedent's death, irrespective of its negligence, was limited by Article 22 of the Convention to $8,291.87.

The plaintiffs thereupon moved, under Rules 103 and 109 of the New York Rules of Civil Practice, to strike those defenses on the ground that they were

sham, irrelevant and insufficient in law, in that (fols. 16-19):

(1) the agreement by respondent to transport the decedent was not subject to or controlled by the Convention;

(2) the rights of the plaintiffs are not controlled or affected by or subject to the Convention;

(3) that, if the Convention operates to limit the amount of plaintiffs' recovery, it is void, because it would then violate Article 1, Section 8, Clause 3 of the Constitution of the United States, and also the Fifth Amendment of the Constitution, for the reasons:

(a) that it constitutes an invasion of the right to regulate foreign commerce exclusively conferred upon Congress by Article 1, Section 8, Clause 3;

(b) that it deprives the plaintiffs of their property without due process of law, in violation of the Fifth Amendment.

In the initial proceeding in the New York Supreme Court, the petitioners specifically raised the constitutional questions by formal notice to that effect (fol. 187). On October 17, 1944, the New York Supreme Court denied the motion with an opinion (R. 66), holding that the defenses based on the Convention were valid.

On May 21, 1945, the Appellate Division of the Supreme Court affirmed the order of Special Term with an opinion by Hagarty, *J.* (R. 72). On June 18, 1945, the Appellate Division granted leave to the petitioners to appeal to the New York Court of Ap-

peals (R. 71), and certified three questions, which may be summarized as follows:

> "Was the order of the Special Term denying plaintiffs' motion to strike from the answer of the defendant, Pan American Airways, the first, second and third affirmative defenses, properly made?"

On April 18, 1946, the Court of Appeals affirmed the order of the Appellate Division and answered the certified questions in the affirmative (R. 96). On October 14, 1946, the Supreme Court of the United States denied the petition for a writ of certiorari with the following memorandum opinion:

> *"The petition for writ of certiorari to the Court of Appeals of New York is denied for the want of a final judgment"* (329 U. S. 741).

Thereafter, and under a stipulation (R., p. 130), wherein the respondent conceded that the death of Manuel Diaz was attributable to respondent's negligence, that the damages sustained by the petitioners in consequence thereof were substantially in excess of the limit of $8,291.87 prescribed by the Convention, and that the law of Portugal afforded a right of action for adequate and complete compensation for the damages the petitioners had sustained through the death of their husband and father, the respondent moved in the Supreme Court, Westchester County, for judgment *in favor of the plaintiffs* in the sum of $8,291.87, and for a direction that the plaintiffs' claim in excess of that amount be stricken out. This motion proceeded on the assumption that the affirmance by the Appellate Division and the New York Court of Appeals of the denial of the motion to strike out the three defenses based on the Convention constituted the law of the case.

On April 27, 1947, Special Term granted the motion and final judgment was thereafter entered in favor of the petitioners in the sum of $8,291.87, and their claim in excess of that amount was stricken.

The plaintiffs then appealed to the Appellate Division from the aforesaid judgment. On December 6, 1948, the Appellate Division affirmed. Judgment was entered on said affirmance in the Office of the Clerk of Westchester County on December 27, 1948 (R., p. 154).

On January 10, 1949, the petitioners moved the Court of Appeals for leave to appeal from the aforesaid judgment of affirmance; and on April 14, 1949, the Court of Appeals denied the petitioners leave to appeal (R., p. 162), thereby completely and finally terminating the litigation in the Courts of this State.

Thus, the required finality of judgment has been achieved, and the petitioners accordingly renew their prayer for a writ of certiorari to review the final determination of the Court of Appeals of the State of New York.

In opposing the respondent's motion for judgment in petitioners' favor to the extent of $8,291.87 and striking out their claim in excess of that amount, the objections discussed above to the applicability of the Convention to this case were reasserted. In addition, a new ground of objection was urged, to wit, that the respondent, by its failure to set forth in its ticket or contract of carriage a statement that the transportation was subject to the rules of liability established by the Convention, barred the respondent from invoking the limitation in this case. Special Term of the New York Supreme Court rejected that contention, as did the Appellate Division in the opinions printed in the record at page 151.

It is submitted that the failure of the New York Courts to hold the respondent to a strict and literal compliance with the requirements of the Convention was wrong. Even were it to be assumed that the Convention properly might be employed to limit a common carrier's liability, the fact must not be overlooked that, certainly in so far as the limitation applies to compensation for personal injuries, leaving apart for the moment actions for wrongful death, it is in derogation of the common law. As such, it must be strictly construed. The Convention expressly provides:

> "For the transportation of passengers the carrier *must* deliver a passenger ticket which *shall* contain the following particulars:
>
> * * * *
>
> (e) a statement that the transportation is subject to the rules relating to liability established by *this Convention.*" 49 Stat. Part II, page 3000,—Article 3(1). (Italics ours.)

The title of "this Convention" is the "Convention for the Unification of Certain Rules Relating to International Transportation by Air", or its French equivalent, "Convention pour L'Unification de Certaines Règles Relatives au Transport Aérien International".

Article 3(2) of the Convention provides:

> "Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered, he shall not be entitled to avail himself of those provisions of this Convention which exceed or limit his liability."

The words "containing the foregoing provisions" of Article 3(1) must be read into Article 3(2) following the word "ticket". Otherwise, the passenger would have no notice that the transportation was subject to the Convention. The requirement can be satisfied only by a ticket containing the statement called for above.

The ticket issued to Manuel Diaz did not contain that statement. On the contrary, it makes no mention whatsoever of the "Convention for the Unification of Certain Rules Relating to International Transportation by Air". Instead, it refers to a "Convention of Warsaw of 12th October, 1929" (fol. 171f).

In two leading English cases, *i. e.*, *Phillipson* v. *Imperial Airways, Ltd.*, 1939 A. C. 332, 345, and *Westminster Bank* v. *Imperial Airways, Ltd.*, 52 Times Law Reports 607, the court held that the failure to insert in the contract or "airway bill" a provision that the carriage was subject to the rules of liability "established by this Convention" foreclosed the carrier from the limitation of liability prescribed in the British Carriage by Air Act, 1932, which adopted and is identical in all substantial respects with the Convention.

Jurisdiction.

Title 28 United States Code, Section 1257, confers jurisdiction upon this Court in the instant controversy; and, since the question presented involves the interpretation and applicability of a Convention, jurisdiction is further imparted by Article 3, Section 2, of the Constitution.

The Facts.

In November, 1942, Manuel Diaz, a steamship owner and operator, with principal offices in New York City, instructed an employee, one Richard Alcorta, to obtain for him airline transportation to Spain (R. 13, 50). Mr. Alcorta communicated with Thomas Cook & Son, respondent's agent in New York, and obtained a ticket purporting to afford transportation on respondent's airline from LaGuardia Field, New York, to Lisbon, Portugal, and return, paying therefor the stipulated fare of $1,157.40 (R. 13). At the same time he obtained from respondent's agent a voucher evidencing receipt of additional prepaid fare for wholly unrelated transportation from Lisbon to Madrid, Spain. No contract of carriage was ever issued for the latter portion of the travel, due to the death of Mr. Diaz at Lisbon (fol. 149).

The ticket obtained by Mr. Alcorta consisted of a cover (fol. 169), an identification coupon (fol. 171D), a priority coupon (fol. 175) and four (4) flight coupons: (1) from New York to Bermuda; (2) from Bermuda to Lisbon; (3) from Lisbon to Natal; and (4) from Natal to New York (fols. 177A-L). The identification coupon designated the transportation as "R.T.", or round trip, and provided that the "transportation under the annexed flight coupon(s) is subject to the rules relating to liability established by the Convention of Warsaw of 12th October, 1929" (fol. 171F). The Convention was not further identified, and the ticket did not set forth its provisions. Although purporting to afford round-trip passage, the return trip portion of the ticket was void because respondent made no return reservation for Mr. Diaz, a stipulated prerequisite to validity by the specific

terms of the alleged contract (fol. 177H and 177K). In so far as a binding contract of carriage existed, therefore, it was limited to transportation from New York to Lisbon, Portugal.

The cover enclosing the several coupons expressly provided (fol. 177N):

> "Each coupon is to be taken as issued as *a separate contract* by and on behalf of the particular company or person named in it."

Portugal has never been a party to the Convention. On the contrary, it is among the countries listed at the end of the identification coupon to which the provisions of the Convention do not apply (fol. 171O).

On February 21, 1943, the respondent's aircraft, the "Yankee Clipper", with Manuel Diaz on board, left LaGuardia Airport, New York City, and, after stops at Bermuda and Horta in the Azores, arrived at Lisbon at 6.55 p. m. on February 22, 1943. While the defendant, Sullivan, was manoeuvring the plane preparatory to landing on the Tagus River, adjacent to Cabo Ruivo Airport, Lisbon, Mr. Diaz' destination, the left wing of the aircraft came in contact with the water, and in the ensuing crash the plane was demolished and sank. Manuel Diaz sustained multiple injuries which resulted in his death at Lisbon the same day (fol. 123).

Following the disaster, the respondent, in remitting to the decedent's executors the unused portion of the fare allocable to the return trip, retained the full rate one-way fare for transportation from New York to Lisbon (fol. 41).

The Decision of the Supreme Court of the State of New York.

It is common ground, and it was so held by the Appellate Division on the initial appeal, that if the decedent's destination had been Lisbon, Portugal, the Convention would not have applied and the petitioners would not be limited in their right of redress by its provisions (*Garcia, et al.* v. *Pan American Airways*, 269 App. Div. 287).

Paradoxically, in sustaining the validity of the defenses based on the Convention, Special Term held that, since the "identification coupon" (fol. 171D) designated New York as the point of departure and "*final destination*", Lisbon, the decedent's *actual* destination, was merely a stopping place; and that the transportation accordingly came within the peculiar definition of "international transportation" employed in Article 1, paragraph 2 of the Convention as

> "Transportation in which, according to the contract made by the parties, the place of departure *and the place of destination* * * * are situated * * * within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory * * * of another Power even though that Power is not a party to this Convention." 49 U. S. Stat. Part II, page 3000. (Italics ours.)

The court refused, in effect, to pass upon the constitutional questions raised, asserting that "the power to declare a law unconstitutional should be exercised cautiously by a lower court and avoided, if possible" (fol. 198).

The basis of the decision of Special Term, there-

fore, was the narrow issue as to whether there was a literal compliance with the definition of "international transportation" in the limited sense of that term specified by Article 1, paragraph 2, of the Convention, and the court did not consider the broad fundamental issues presented for its consideration. To the extent that the court did pass on the merits of the controversy, it fallaciously concluded that the decedent's destination was New York, although even at the moment of his death he was bound from New York to Lisbon, en route to Spain; and it wholly misapprehended the significance of the uncontradicted and uncontested fact that the decedent's *destination* was Lisbon. The court further disregarded the fact that the applicability of the Convention is not determinable by the passenger's *"final destination"*, a term not used in the Convention, but by his *destination;* and it failed to realize that the designation of New York as the passenger's *"final destination"* was either an obvious mis-description of the itinerary, resulting from manifest error, or a deliberate ruse employed to extend the scope of the Convention beyond the sphere which its framers deemed proper under fundamental rules of international law.

The Decision of the Appellate Division.

The Appellate Division concurred in the petitioners' contention that, in an action in the American courts to recover damages for wrongful death, the *lex loci* is determinative, not only of the right of recovery, *but also of the measure of damages,* and that the *lex fori* is wholly irrelevant in such circumstances. Confronted with the fact that the Convention, to the extent it is effective at all, is merely a law of the nations subscrib-

ing to the Convention, *i. e.*, the *lex fori* of such nations, and wholly inapplicable to an action based on a tort committed in Portugal, not a party to the Convention, the court nevertheless held that the Convention has created an exception to the universally honored concept of international law that the *lex loci* controls the right of recovery and the measure of damages, and now substitutes the *lex fori* as the arbiter of the amount of damages the next of kin may recover (R. 78). In other words, the Appellate Division attributed to the framers of the Convention and to the State Department the intent of extending the applicability of its provisions to torts committed in the territory of a friendly independent sovereign state, not a party to the Convention, although such endeavor has repeatedly been denounced and rejected by all authorities on international law and has invariably been discountenanced by the courts of this country, State and Federal alike.

In subscribing to the theory advanced by the respondent, the Appellate Division frankly conceded (R. 76) that if "this was a flight contemplating New York as the place of departure, and Lisbon as the place of destination, the Warsaw Convention would not apply". But it is clear that that is precisely the type of transportation contemplated. While so conceding, the court permitted the petitioners to be deprived of their just rights to redress by means of the pernicious juggling of words which designated the decedent's "final destination" as New York instead of Lisbon. The court rejected the further contention of the petitioners that, under the precise and careful wording of the alleged contract, and it should be borne in mind that the Convention as construed in this case is in derogation of the common law and must be strictly construed, the

decedent was being transported, at the time of his death, under a flight coupon which was expressly designated a "separate contract", and in which the point of departure was Bermuda and the *destination* Lisbon, with the inescapable result that, under the definition of Article 1, Section 2 of the Convention, the transportation was not "international transportation" and, consequently, neither the decedent nor the petitioners were subject to its provisions. In nullifying that point the court palpably misconstrued, and held applicable, Article 1, Subdivision 3 of the Convention, which deals with successive air carriers, and not *separate contracts,* and has no relevancy to this case, in which only one carrier was involved. The court likewise overlooked the fact that the Priority Coupon (R. 58, fol. 177) which was issued by the United States Government and was the *sine qua non* of the decedent's departure from LaGuardia Field, designated *Lisbon* as the passenger's destination.

On the fundamental objection to the applicability of the Convention based on the conflict of its provisions with the constitutional safeguards asserted on petitioners' behalf, the court contented itself with the reassertion of the platitude that "the Convention as a treaty, constitutes part of the law of this land, overriding State law and policies" and that "its provisions supersede the usual doctrine that the right and measure of recovery are governed by the *lex loci* and not by the *lex fori*" (R. 78).

In so holding, the court completely failed to grasp the nature and function of a convention, which, incidentally, does not enjoy the solemnity and dignity of a treaty, and completely overlooked the fact that even a United States treaty does not and cannot impose obligations on, or grant immunities to, American

citizens, *inter se,* with respect to events involving only United States citizens, taking place in the territory of a nation with which this Government has no treaty. The court totally disregarded the basic elementary fact that American citizens are not governed by treaties, but by the laws of Congress, and that a convention between the United States and third party powers, to which the Republic of Portugal does not subscribe, is wholly inoperative as to a right created under Portuguese law for acts committed within the territory of that sovereign. Nor can the argument be entertained that the Convention imposes a new public policy that, in recognizing such right of action under principles of international comity, the recognition shall be limited to $8,291.87, because that is not what the Convention purports to do. It states, on the contrary:

> "In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs."

That is to say, taken literally, the Convention, as interpreted by the New York Courts in this case, purports to override the unlimited right of recovery afforded by Portuguese law, and to create a different right of action for torts committed in Portuguese territory. It is therefore not an expression of public policy, but a direct invasion of the sovereignty of Portugal in respect of wholly internal issues. That concept is clearly untenable.

The Decision of the Court of Appeals.

No opinion was written by the Court of Appeals in its order and judgment of affirmance. The reasoning and conclusions which prompted its decision re-

main unknown. Since the sole issues presented, however, were the operation and effect of the Convention, as such, and in relation to the United States Constitution, it must be assumed that the court held the Convention controlling in this action, and that the application of its provisions does not conflict with long honored principles of international law and does not violate the Fifth Amendment to the Constitution, or Article 1, Section 8, Clause 3 thereof.

Questions Involved and Reasons for Granting the Writ.

I. *Does the "Convention for the Unification of Certain Rules Relating to International Transportation by Air, Warsaw, 1929" (49 U. S. Stat. Part II, page 3000), apply to an action instituted by American citizens in the New York courts to recover damages from a New York corporation, a common carrier by air, for death resulting from a wrongful act committed by that corporation in the territory of the Republic of Portugal, which is not a party to the Convention, or does the law of Portugal determine the right of recovery and measure of damages?*

The decision of the New York courts in this case is in direct conflict with the decisions of the Circuit Court of Appeals for the Third and Second Circuits in the cases of *Curtis* v. *Campbell*, 76 F. (2d) 84; cert. denied, 295 U. S. 737, and *The Mandu*, 102 F. (2d) 459, respectively, where it was held that if the sovereign, within whose jurisdiction the wrong resulting in death is perpetrated, has created a right of action in favor of surviving next of kin, that law, *and that law alone*, controls not only the right of re-

covery but also the measure of damages, and that, notwithstanding the fact that the public policy of the forum might be different from the *lex loci*, the court of the former will recognize and entertain an action predicated on the *lex loci* and will be controlled by that law in determining the amount of damages. In the former case, the Circuit Court of Appeals for the Third Circuit said:

> "The defendant's position is that the policy of the state—the forum of the action—is to be found in its laws; and when a law of the locus of the action differs from and therefore (she says) contravenes a corresponding law of the forum, the law of the former state will not be enforced. * * *
> * * * The heart of the matter is that the law of the place of a tort gives a 'right of action' to one falling within its terms; and it does so without regard to the residence of the tort-feasor. In such case 'the law of the place where the right of action was acquired or the liability was incurred will govern as to the right of action', Story on Conflict of Laws (9th Ed.) 775; American Law Institute Restatement Conflict of Laws, Secs. 449, 455; *Texas & N. O. R. Co.* v. *Gross*, 60 Tex. Civ. App. 621, 128 S. W. 1173; *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198; *Slater* v. *Mexican R. R. Co.*, 194 U. S. 120, 126, 24 S. Ct. 581, 48 L. Ed. 900; *Ormsby* v. *Chase*, 290 U. S. 387, 54 S. Ct. 211, 78 L. Ed. 378, 92 A. L. R. 1499; *and as to the measure of damages* * * *." (Italics ours.)

The decision is likewise in conflict with the decision of the United States District Court, Southern District of New York, in the case of *Choy* v. *Pan American Airways, Inc.*, 1941 A. M. C. 483 (not officially reported), where the court held that the

Convention here in dispute is not self-executing and does not constitute a rule of law capable of enforcement by the courts. The principle expressed in *Curtis* v. *Campbell, supra,* is in complete accord with the decisions of the United States Supreme Court, the Circuit Court of Appeals for the Second Circuit and, indeed, with prior decisions of the New York Court of Appeals, in the following cases:

Panama Railroad Co. v. *Rock*, 266 U. S. 210;
Cuba Railway Co. v. *Crosby*, 222 U. S. 473;
Slater v. *Mexican Natl. R. R. Co.*, 194 U. S. 120;
Northern Pacific R. R. Co. v. *Babcock*, 154 U. S. 190;
Hunter v. *Darby Foods, Inc.*, 110 F. (2d) 970, 971;
Curtis v. *Campbell*, 76 F. (2d) 84, cert. den. 295 U. S. 737;
The Mandu, 102 F. (2d) 459;
Baldwin v. *Powell*, 294 N. Y. 130;
Fitzpatrick v. *International Ry. Co.*, 252 N. Y. 127;
Loucks v. *Standard Oil Co.*, 224 N. Y. 99;
Whitford v. *Panama R. R. Co.*, 23 N. Y. 465.

This Convention, which the United States was not instrumental in formulating and to which it simply "adhered", without any reported discussion in the Senate as to its possible repercussion upon the settled public policy of the country, both State and Federal, can, under the most favorable interpretation, be law only within United States territory or that of other signatory nations. As such, its applicability is co-extensive only with such territory, or upon the high seas. It is not law in Portuguese territory, and

possesses no efficacy whatsoever in such territory. When respondent airline voluntarily entered Portugal, it became subject to that nation's laws and responsible, under those laws, for the torts it committed there.

In *Widenhaus's Case*, 120 U. S. 1, the United States Supreme Court said:

> "It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement; for, as was said by Chief Justice Marshall in *The Exchange*, 7 Cranch, 116, 144, 'it would be obviously inconvenient and dangerous to society and would subject the laws to continual infraction, and the government to degradation, if such * * * merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country'."

The laws of the United States do not extend to Portuguese territory and are powerless to create a right of action within such territory, or limit a right created under Portuguese law. *Cunard Steamship Co.* v. *Mellon*, 262 U. S. 100, 123.

It is, therefore, a violation of the law of nations to attribute to this Convention the power to modify or diminish rights created in the petitioners' behalf by the sovereign Republic of Portugal, when Portugal has expressly refrained from adopting the Convention; and it is equally repugnant to settled juristic principles to deny full recognition to that law when it is asserted in the courts of New York by American

citizens domiciled in this State. Such procedure is wholly wrong and finds no precedent in legal history.

II. *Does the application of the Convention under such circumstances, with resultant limitation of the carrier's liability and diminution of the next of kin's recovery, deprive the latter of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States?*

The principle that the right of action asserted by petitioners in this case is a purely personal property right, entirely independent of any rights which might have inured to the decedent had he survived, is generally recognized. *Van Beeck* v. *Sabine Towing Co.*, 300 U. S. 342; *Baldwin* v. *Powell*, 294 N. Y. 130; *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99; *Whitford* v. *Panama Railroad Co.*, 23 N. Y. 465; *Holmes* v. *City of New York*, 269 App. Div. 95; *Air Carrier's Liability to Passengers in International Law*, 7 Air Law Review 56 (1936). Consequently, a contract between a common carrier and the passenger purporting to limit that right is invalid. *Seward* v. *The Vera Cruz* (1884), 10 App. Cas. 59, 67; *Nunan* v. *Southern Railway Co.* (1924), 1 K. B. 223, 228.

The framers of the Convention, in recognition of that principle, omitted from its provisions any reference to the rights of surviving next of kin; and it is manifest that the limited right of recovery therein provided applies only to the contracting party, *i. e., the passenger*, or his estate in the event of death, leaving undisturbed the rights of widows and children and other surviving next of kin, a field which the Convention, under elementary principles of law, is incapable of effecting.

The attempt by common carriers to arbitrarily limit their liability to surviving dependents has been regarded for many years as antagonistic to the public interests, opposed to public policy, and untenable in the enlightened views of contemporary social responsibility. This court unqualifiedly condemned the attempt to frustrate the humane aims which prompted the creation, in all civilized states, of a right of recovery for death by wrongful act and damages commensurate to the pecuniary loss thereby sustained. In *Van Beeck* v. *Sabine Towing Co.*, 300 U. S. 342, this court in just such a case granted certiorari "to prevent a manifest injustice". Mr. Justice Cardozo pointed out that:

> "The statutory cause of action to recover damages for death ushered in a new policy and broke with old traditions" (p. 344).
>
> "Death statutes have their roots in dissatisfaction with the archaisms of the law which have been traced to their origin in the course of this opinion. It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied. * * * Its intimation is clear enough in the statutes now before us * * * shall not be stifled * * * by the perpetuation of a policy which now has had its day" (p. 350).

The same jurist, in *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, condemned as "provincial" the refusal to accord full recognition to the foreign law when relied on in our courts, expressing the view that "*if a foreign statute gives the right, the mere fact that we do not give a like right, is no reason for refusing to help the plaintiff in getting what belongs to him.*" Manifestly, therefore, the New York courts were

wrong in holding that the Convention is applicable to this action, and that its provisions supersede the law of Portugal, where the tort was committed. To so apply it is to deny due process in violation of the Fifth Amendment.

III. *May the Convention, which, like treaties, operates extra-territorially in so far as American citizens are concerned, be invoked in an action in the New York Courts between two New York citizens in respect of a tort committed in the territory of Portugal, a non-member of the Convention?*

It is fundamental and axiomatic that the treaty making power does not extend to civil law suits between American citizens in the courts of the respective states to enforce a cause of action created by the law of a nation not party to such treaty, and arising from a tort committed in territory other than that of the signatory nations.

It is not within the scope of the treaty making power to place an arbitrary valuation on the life of an American citizen or to limit the liability of a domestic common carrier whose negligent act, in the territory of a nation with which the United States has no treaty on the subject, destroys that life. Cf. *Pagano* v. *Cerri*, 93 Ohio St. 345, 112 N. E. 1037; *Matter of D'Adamo*, 212 N. Y. 214.

> "A treaty is, it is true, the supreme law of the land, but it is nevertheless only a law imposed by the Federal Government and subject to all the limitations of other laws imposed by the same authority. While internationally binding the United States to the other contracting powers, it may be municipally inoperative, because it deals

with matters in the State as to which the Federal Government has no power to deal." *Bayard, Secy. of State, to Miller*, Moore, Dig. Int. L. Vol. 178.

It is utterly inconsistent with the American concept of Government to *invert* the treaty-making power in such manner that it operates internally, or intranationally, upon the private rights and obligations of American citizens. "A treaty is in its nature a contract between two nations, not a legislative act." *Foster and Elam* v. *Neilson*, 2 Pet. 253. It is an agreement between sovereigns in which one power accords rights or immunities to the citizens of the other contracting power while in its territory, in exchange for reciprocal benefits conferred upon its own citizens while in the territory of the other power. The Government of the United States does not grant immunities, confer rights, or impose obligations on United States citizens by means of a treaty with a foreign power, where no foreign nationals are involved. Whatever rights are acquired by a treaty, in so far as the United States is concerned, are those accorded the citizens or subjects of the other contracting party while in United States territory. The respondent, in invoking the Convention, is claiming no immunity conferred upon it by Great Britain or any other foreign power adherent to the Convention. On the contrary, it is asserting that the Government of the United States, in adhering to the Convention, granted to respondent, a United States citizen, immunity from full responsibility for its unlawful acts committed against other American citizens in the territory of a nation not a party to the Convention. That theory is completely erroneous, and the doctrine underlying it, pernicious.

In his Manual of Parliamentary Practice, Thomas Jefferson, speaking of the treaty power, said:

> "By the Constitution of the United States this department of legislation is confined to two branches only of the ordinary legislature—the President originating and the Senate having a negative. To what subjects this power extends has not been defined in detail by the Constitution; nor are we entirely agreed among ourselves. 1. It is admitted that *it must concern the foreign nation party to the contract* or it would be a mere nullity, *res inter alias act*. 2. By the general power to make treaties, the Constitution must have intended to comprehend only those subjects which are usually regulated by treaty, *and cannot be otherwise regulated*. 3. It must have meant to except out of these the rights reserved to the States; for surely the President and Senate cannot do by treaty what the whole Government is interdicted from doing in any way. 4. And also to except those subjects of legislation in which it gave a participation *to the House of Representatives*." (Sec. 42, 1800, Dickinson, the Law of Nations, p. 1030). (Italics ours.)

In "Research in International Law, Draft Convention of the Law of Treaties" (Harvard Law School), 29 A. J. I. L. Supp. (1935), 653, 918, it is said:

> "A treaty may not impose obligations upon a state which is not a party thereto * * * Paragraph (a) of this article affirms a general principle admitted by all writers on international law * * * Cavaglieri (Regles Generales du Droit de la Paix, 26 Recueil des Cours, 1929, p. 527) remarks that the rule that treaties bind only States which are parties to them is one of the most certain and

universally accepted principles of international law."

Today particularly, in view of the import of the Atlantic Pact, which has for one of its primary aims the preservation of the juridical and territorial integrity of existing States, it is wholly inconsistent to proclaim that a Convention, to which Portugal is not a party, may supersede the sovereign right of Portugal to make its own laws, which, certainly in this instance, cannot be said to violate, but, on the contrary, enhance, principles of justice.

Under the circumstances, therefore, the fact that Portugal is not a party to the Convention completely excludes its provisions from this case in which Portuguese law controls the right of recovery *and the measure of damages.* Just as the Convention is wholly inoperative within Portugal, it is equally impotent to alter or modify the vested property rights acquired by the petitioners under the law of Portugal, and here sued on.

While United States citizens may, when in the territory of a foreign nation, invoke rights secured to them by a treaty between the United States and such foreign nation, there is no instance in the legal history of this country in which a United States citizen has claimed rights under a treaty in connection with events transpiring within the territory of a foreign power with which the United States has no treaty. The reason for this is two-fold. In the first place, no treaty has ever contemplated such a situation, and no President has ever felt it fitting to pervert the treaty-making power towards ends not comprehended by such power. In the second place, while the sovereign people of the United States entrusted to their

representatives in Congress the right to regulate domestic affairs by legislative enactment of both Houses, they never surrendered to the Executive legislative powers over internal municipal affairs where only American citizens are involved. That being so, it is manifestly improper to attempt to use the treaty-making power as a substitute, in any situation where only American citizens are concerned, as is here the case, for legislative enactment by both Houses of Congress. The House of Representatives was not consulted in relation to the adherence to the Convention by the United States.

IV. *Does the President, in the exercise of the treaty-making power, have the right to regulate foreign commerce by adherence to a Convention, without the concurrence of the House of Representatives, or is such procedure an usurpation of the power conferred upon Congress by Article 1, Section 8, Clause 3 of the United States Constitution?*

> "Commerce consists in intercourse and traffic, including navigation and the transportation of persons and property." *Mobile County* v. *Kimball*, 102 U. S. 691.

Inasmuch as the Convention operates in a field in which the House shares co-equal, joint and concurrent power with the Senate, *i. e.*, regulation of foreign commerce, the Convention cannot be interpreted to achieve the purpose ascribed to it by the New York Courts in this case, and divest the House of Representatives of the powers conferred by the Constitution.

The right to regulate foreign commerce is, under Article 1, Section 8, Clause 3 of the Constitution,

specifically entrusted to the Congress of the United States:

> "The Congress shall have the power * * *
>
> 3. To regulate commerce with foreign nations, * * *
>
> 18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, * * *."

Article 1, Section 1 of the Constitution provides that

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The power of Congress to regulate commerce "is the power which previously existed in the States". *State of South Carolina* v. *State of Georgia*, 93 U. S. 4. The Executive Department possesses only that power given to it by the Constitution. Neither the States nor the people gave to the President the power to regulate foreign commerce, by treaty or otherwise. On the contrary, that power was expressly given to the Congress of the United States.

In *Board of Trustees* v. *United States*, 289 U. S. 48, 56, the United States Supreme Court said:

> "The Congress thus asserted that it was exercising its constitutional authority, 'to regulate commerce with foreign nations', Art. 1, Sec. 8, Par. 3. The words of the Constitution 'comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this

> country and any other, to which this power does not extend'. *Gibbons* v. *Ogden*, 9 Wheat. 1, 193. It is an essential attribute of the power that it is *exclusive* and *plenary*." (Italics ours.)

It is incorrect to state, therefore, that any treaty or any Convention is "the supreme Law of the Land". Article 6 of the Constitution, in point of priority, gives precedence to "this Constitution, and the laws of the United States which shall be made in pursuance thereof".

> "A law of Congress regulating commerce is the supreme law." *Thurlow* v. *Massachusetts*, 46 U. S. 504.

The power of Congress to regulate foreign commerce is, therefore, a prerogative of that body; and the other departments of the Government may not assume the right to exercise such power. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203; *Robbins* v. *Shelby Taxing Dist.*, 120 U. S. 489, 493.

V. *Is the Convention self-executing in the sense that it requires no implementing legislation by Congress in order to be applicable by the courts as a rule of law?*

The United States District Court, Southern District of New York, in *Choy* v. *Pan American Airways, Inc.*, 1941 A. M. C. 483 (not officially reported), held that the Convention is not self-executing and may neither be invoked as conferring a cause of action or relied on as constituting a limitation of liability. In that case, the District Court sustained the contention of the present respondent, advanced through its present

attorneys, that the Convention *is not self-executing* and dismissed a cause of action based thereon.

The New York Supreme Court, in the case of *Wyman* v. *Pan American Airways, Inc.*, 181 Misc. 963, aff'd 267 App. Div. 947, aff'd 293 N. Y. 878, cited and followed the decision of the District Court in the case last referred to, as authority for its conclusion that the Convention, although purporting to create a cause of action, was, of itself, incapable of producing that result.

Apart from all other considerations, the nature of the American system of government renders it utterly impossible to sustain the contention that any Convention of this type is operative in the absence of implementing legislation by Congress; and that fact was freely acknowledged by Hon. Elihu Root when, as Secretary of State, he approved a State Department report in which the suggestion that such Conventions could supplant the House of Representatives in matters delegated to it by the Constitution was rejected. That report, later published under the title "The Extent and Limitation of the Treaty Making Power under the Constitution", in 1 Am. Jr. Int. Law 636, 654-655, in part reads:

> "But whether the rule will ultimately be extended, it would seem to be already established beyond question that treaty stipulations, however complete they may be in themselves, cannot be self-executing so as to become the supreme law of the land, as defined by the decisions of the Supreme Court, where they deal with the powers which are delegated by the Constitution exclusively to Congress. *In such cases, the treaty is incomplete without congressional action*, and its

ratification should be understood to be conditioned upon the sanction of an act of Congress." (Italics ours.)

This is the first instance in the history of American jurisprudence in which a convention, to which the United States "adhered", has been construed as nullifying and destroying the right conferred on private American citizens by an independent, friendly sovereign power for a wrong committed by another American citizen in the territory of such power. The interpretation placed on this Convention by the New York courts in this case is productive of most serious consequences and, aside from depriving the American traveling public of the right to hold a negligent common carrier responsible for its negligence, introduces a doctrine wholly opposed to the American concept of Government and the long cherished theory of "checks and balances".

It has interjected into American jurisprudence and the political scheme, the strange and dangerous doctrine that the President, in the exercise of the treaty-making power may, by the simple expediency of "adhering" to a convention with foreign powers, intervene in private litigation between American citizens, *vis-a-vis*, in the courts of the several States and there control not only the amount of recovery, but the right of recovery as well. The construction accorded the Convention in this case, where an accident occurred in a country not a party to the Convention, is little short of complete destruction, by judicial fiat, of the right of the House of Representatives to participate with the Senate in the control of international aviation, even in the case of an accident occurring in a country not a party to the Convention, a field of foreign commerce of increasing importance.

It is a matter of the utmost concern to the American traveling public, as well as to their dependents, that, by the Convention, a value of $8,291.87 has now been placed on the lives of American citizens who travel by air; and in this era of ever expanding aerial commerce, the Supreme Court of the United States should pass upon and decide whether the limitation of liability provided for in the Convention can be countenanced without doing violence to the law of nations and without depriving American citizens of their civil liberties. Indeed, at the present time three other actions involving the Convention are pending in this State and thus far the courts of New York have continued to hold that the Convention controls.

Finally, this Convention does not, and as a "treaty" probably cannot, create any cause of action for wrongful death during a flight comprehended within its provisions. In *Wyman* v. *Pan American Airways, Inc.*, 181 Misc. 963, aff'd 267 App. Div. 947, aff'd 293 N. Y. 878, cert. den. 324 U. S. 882, the court expressly held:

> "No new substantive rights were created by the Warsaw Convention * * *"

Therefore, unless the right of action created by the law of the place where the decedent's death occurred applies, the decedent's family is deprived of all remedy.

Importance of the Questions Involved.

If this decision, which is based upon a clear misconception of the nature, extent and operation of the treaty-making power, is permitted to stand, it will

introduce utter chaos in the field of international law, and will work a pronounced transformation in the American form of government. The result will be the curtailment, almost to the extent of complete annihilation, of the power of the House of Representatives to participate in the enactment of laws governing the internal administration of justice in the courts of the respective States. While it is true that in a proper case a treaty of the United States, in common with the Constitution and the laws enacted by Congress, constitutes the supreme law of the land, it was never intended that the treaty-making power should operate internally with respect to controversies between American citizens in the courts of the several States, nor that that power should be employed to divest Congress of its plenary and exclusive jurisdiction over foreign commerce. The reluctance of State courts to pass on questions of international magnitude should not be permitted to deprive these plaintiffs of rights secured to them by a friendly foreign power which, under principles of comity, have always been accorded recognition in State and Federal courts alike.

In view of the tremendous expansion in international transportation of passengers and goods by air, and the almost universal unfamiliarity on the part of the American traveling public with the drastic curtailment of their right of redress against common carriers by air which the Convention, as construed in this case, has brought about, it is of transcendent interest and importance to the American traveling public in particular, and to all citizens of the United States in general, that the issues here presented be definitely and finally resolved by this court.

WHEREFORE, petitioners pray that this Court issue a writ of certiorari to the Supreme Court of the State of New York, County of Westchester, directing said court to send to this Court for a review of the decision of the New York Court of Appeals, rendered on April 18, 1946, and April 14, 1949, a full transcript of the record in said Court of Appeals, in the case entitled "Marcelino Garcia and Victor Alvarez, as Executors, etc., Edith Gilmour Diaz, Mary Adela Eads and Manuel Diaz, Jr., Plaintiffs-Appellants, v. Pan American Airways, Inc., Defendant-Respondent", filed in the Office of the Clerk of Westchester County, and that the decision of said Court of Appeals be reversed, and for such other relief in the premises as may be just.

Dated, New York, N. Y., July 7, 1949.

MARCELINO GARCIA,
Surviving Executor of the Last Will and Testament of Manuel Diaz, Deceased,

EDITH GILMOUR DIAZ, MARY ADELA EADS and MANUEL DIAZ, JR.

By FRANCIS X. NESTOR,
Attorney for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. .

MARCELINO GARCIA and VICTOR ALVAREZ, as Executors of the Last Will and Testament of Manuel Diaz, Deceased, EDITH GILMOUR DIAZ, MARY ADELA EADS and MANUEL DIAZ, JR.,

Petitioners,

—against—

PAN AMERICAN AIRWAYS, INC.,

Respondent,

and

R. O. D. SULLIVAN,

Defendant.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Opinions Below.

The present petition for a writ of certiorari is based not only upon the second series of litigation in this case resulting in the final determination of the New York Courts, but also upon the initial litigation in which the earlier petition for a writ was denied for lack of finality; and the arguments hereinafter ad-

vanced are predicated upon the record in both proceedings.

In the initial proceeding, the opinion of the New York Supreme Court, Westchester County (R. 66, fol. 196) is officially reported in 183 Misc. 258. The opinion of the Appellate Division (R. 74, fol. 78) is officially reported in 269 App. Div. 287. The decision of the New York Court of Appeals is officially reported in 295 N. Y. 852. The order and judgment of the Court of Appeals, dated April 18, 1946, affirming the order of the Appellate Division, is printed at pages 96 to 97 of the record.

In the second proceeding, the opinion of the New York Supreme Court, Westchester County (R. 141, fol. 422), is reported in 77 New York Supp. (2nd) 256 (not officially reported). The opinion of the Appellate Division (R. 151) is officially reported in 274 App. Div. 996. The final determination of the New York Court of Appeals denying leave to appeal, dated April 14, 1949, is not officially reported, and is printed at page 162 of the record.

Jurisdiction of This Court.

The jurisdiction of this court is founded on Title 28 United States Code, Section 1257, and Article 3, Section 2 of the United States Constitution.

The Facts.

The facts are stated in the petition and will not be repeated here.

POINT I.

The law of Portugal exclusively controls the petitioners' right of recovery and measure of damages. The transportation was not "international", and the New York Court of Appeals erred in holding that the Convention applies.

The respondent, a common carrier, through the negligent operation of its aircraft in the interior of Portugal, caused the decedent's death. That is the outstanding and controlling fact in this case.

Few principles of law have been accorded the universal recognition enjoyed by the rule that in actions for wrongful death the *lex loci* is the sole determining factor both as to the next of kin's right of redress and the measure of their compensation.

The Supreme Court of the United States, in *Van Beeck* v. *Sabine Towing Co.*, 300 U. S. 342, emphasized the humane ends sought to be attained through the death statutes of the several States, and characterized them as a distinct step forward in meeting the social responsibility which an enlightened public consciousness recognized and accepted.

The misapprehension under which the New York Courts labored in their decisions in both phases of this litigation has laid the foundation for an unconscionable denial of justice to the American traveling public and, in fatal accidents, their dependent next of kin. The distaste which the perseverance in this error has evoked among the jurists of the New York Court of Appeals is disclosed in the dissenting opinion of Conway, *J.*, in *Ross* v. *Pan American Airways*, 299

N. Y. 88, where even the Judge who wrote the prevailing opinion sustaining the Convention characterized it as "drastic". Judge Conway said:

> "When the Convention was concluded in 1929, only two years after Lindbergh's historic flight, international air travel was in its infancy. We were living in a different world and airlines were no doubt thought to need assistance in developing international air travel. There can be little doubt, however, that the framers of the Convention included the requirements mentioned in view of what my brother DESMOND has termed the 'drastic restrictions' of the Convention. They were drastic even in 1929. Injury or death from negligence of the carrier was fixed at 125,000 'French francs consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths' (art. 22, par. [4], or $8,291.87. Since then our dollar has been devaluated 40% so that the total amount recoverable for injury or death due to negligence is less in 1929 dollar value than $5,000. In our opinion the aims and intendments of the Warsaw Convention and the protection of our own residents are best served by refusing summary judgment drastically limiting liability except upon proof that 'international transportation' was contracted for by the passenger or her duly authorized agent and that a ticket was delivered, with the particulars required by the Warsaw Convention printed thereon to the passenger or his or her duly authorized agent. The airlines have been given the utmost consideration as against the passengers they are paid to transport. At least they should be held sharply to the doing of the few acts which are required by the Warsaw Convention in return for the consideration granted them."

In every instance in which the right of next of kin to recover damages for the wrongful death of a decedent has come before the Supreme Court of the United States, that Court, without deviation, has invariably held that the *lex loci* exclusively controls both in respect of the right of recovery and as to the measure of damages.

Northern Pacific R. R. Co. v. *Babcock,* 54 U. S. 190;
Cuba Railroad Company v. *Crosby,* 222 U. S. 473;
Slater v. *Mexican National Railroad Co.,* 194 U. S. 120;
Van Beeck v. *Sabine Towing Co.,* 300 U. S. 342.

The New York Court of Appeals, in the case of *Whitford* v. *Panama R. R. Co.,* 23 N. Y. 465, decided the precise problem here presented, *i. e.,* whether the foreign law was to be applied even though it differed from the *lex fori,* and held that "in either case, the quality and legal effects of the acts, and the liabilities which they entail upon the parties, depend solely upon the laws of the sovereign within which they are transacted". At the time that case was decided, the New York statute provided for a limited right of recovery indistinguishable in principle from the limited right of recovery provided by the Convention. The Court of Appeals refused to limit the recovery under the New York law, stating:

> "Or suppose that (foreign) Government had passed a statute like ours, except that the amount which might be received was unlimited, no one, I presume, would deny that the full amount of damages which could be proved might be re-

covered, though it might exceed the limit in our statute in whatever court the suit might be brought." (Matter in parentheses supplied.)

The Convention in dispute, even if properly dignified by the term "treaty", is no more than an American law. The most that can be claimed for it is that it controls in the case of death or injury occasioned through a carrier's wrongful act committed in United States territory, on the high seas, or in the territory of another adherent to the Convention. In each of those situations, it might be urged with some plausibility that the *lex loci* has been changed, or modified, by the Convention; but that fact has no bearing whatsoever on a tort committed in Portuguese territory, a non-member, or to the actions brought by American citizens in American courts to enforce rights created under Portuguese law. To so hold is to repudiate settled principles of international law and usage long observed by civilized states, which had their origin, not in expediency, or in disregard of law, but in the sound perception of the law of nations. "International law is * * * the law of all States of the Union", *Skiriotis* v. *Florida*, 313 U. S. 69, 72.

The sole question here to be determined is whether there is any feature of the causes of action alleged in the complaint which offends our ideas of decency, shocks the public morals, or does violence to principles of justice and rights. Under the authority of *Curtis* v. *Campbell*, 76 F. (2d) 84, cert. denied 295 U. S. 737, and *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, the New York courts, irrespective of any modification the Convention may have effected in American law with respect to aviation disasters occurring with-

in the territory of member nations, should have recognized and applied the law of Portugal and should have accorded full recognition, without limitation, to petitioners' claim based on Portuguese law. In the case last cited, the New York Court of Appeals, through Cardozo, *J.*, said:

> "A tort committed in one state creates a right of action that may be sued upon in another unless public policy forbids. That is the generally accepted rule in the United States" (224 N. Y. at p. 106).
>
> "The Supreme Court of the United States has held under like conditions that the foreign law governs not only the definition of the tort, but also the assessment of the damages (*Northern Pacific R. R. Co.* v. *Babcock*, 154 U. S. 190; *Slater* v. *Mexican Natl. R. R. Co.*, 194 U. S. 120, 126). An amendment to the Constitution has abrogated the limitation upon the amount of the recovery, and established the public policy of the State on a new and broader basis (Const. Art. 1, Sec. 18)" (224 N. Y. at p. 109).
>
> "The plaintiff owns something, and we help him to get it (*Howarth* v. *Lombard*, 175 Mass. 570; *Walsh* v. *B. & M. R. R.*, 201 Mass. 527; *Walsh* v. *N. Y. & N. E. R. R. Co.*, 160 Mass. 571; *Beale, Conflict of Laws*, (Secs. 51, 73) * * * Sometimes we refuse to act where all the parties are nonresidents (*Burdick* v. *Freeman*, 120 N. Y. 420; *English* v. *N. Y., N. H. & H. R. R. Co.*, 161 App. Div. 831). That restriction need not detain us; in this case all are residents * * * A right of action is property. If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him * * * The courts are not free to refuse to enforce a foreign

> right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal" (224 N. Y., at pp. 110-111).

The foregoing interpretation of the law was confirmed by the Circuit Court of Appeals for the Second Circuit, in *Hunter* v. *Darby Foods, Inc.,* 110 F. (2d) 970, 971; *The Mandu,* 102 F. (2d) 459, and by the New York courts in *Baldwin* v. *Powell,* 294 N. Y. 130; *Arams* v. *Arams,* 45 N. Y. Supp. (2d) 251, 254. The text writers are in accord. *Beale, The Conflict of Laws,* vol. 2, pp. 1634-44, p. 1298; Ibid., vol. 2, pp. 1332, 1643, 1644.

POINT II.

The Convention, as interpreted by the New York courts, deprives petitioners of their property without due process of law, and violates the Fifth Amendment of the Constitution.

The situation here presented is simply this: American citizens resident in New York State enlist the aid of the New York courts to enforce a right of action against a New York corporation arising from a tort committed against them in the territory of a friendly foreign power, and predicate their right to adequate compensation on the *lex loci* in accordance with the fundamental rule. The New York courts entertain the action but refuse to apply the controlling law. That, we submit, is a denial of due process and a violation

of the Fifth Amendment of the United States Constitution. The rights here asserted are purely personal to the petitioners. No one, other than the Republic of Portugal, which conferred them, has the power to limit or annul those rights. Cardozo, *J.*, speaking of this precise type of action in *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, said:

> "A right of action is property. If a foreign statute gives the right the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him."

The difficulty of formulating a precise definition of what constitutes the absence of due process is generally acknowledged. However, the result following from a particular situation is one test. The result of the decision in this case is that these petitioners have sustained a grievous wrong, and are left without a remedy.

We submit that the courts below have ascribed to the Convention a result never intended by the President in advocating adherence to it, or by the Senate in giving their assent thereto. It is incredible that the late President of the United States, hailed by many as a champion of human rights, would countenance the abolition of the rights of dependent widows and children without providing a substitute right of action in place of those rights. Yet, the Convention has been construed by the New York courts, as well as by the United States District Court for the Southern District of New York, *as creating no right of action.* In *Wyman* v. *Pan American*

Airways, Inc., 181 Misc. 963, affirmed 267 App. Div. 947, affirmed 293 N. Y. 878, the court said:

> "No new substantive rights were created by the Warsaw Convention * * *
>
> The right of any recovery in this action thus must depend on some statute. The New York Decedent Estate Law (Sec. 130) can have no application as the injury or death did not occur within the territorial confines of the State."

In *Choy* v. *Pan American Airways, Inc.*, 1941 A. M. C. 483, U. S. D. C., S. D. N. Y. (not officially reported), Clancy, *J.*, said:

> "Nor do we think the claim under the Warsaw Convention should be insisted upon. There is no enabling act vesting the ownership of the cause of action stated by the Warsaw Convention nor even stating who may be thought to be injured by a death and, though the liability stated in Article 17 is part of the treaty which was adopted, we do not understand how it can be defined or enforced without statutory assistance, which it has not as yet received."

The petitioners are thus confronted with a situation in which the courts of New York have rejected the law of Portugal, which is the only pertinent law, and have applied an inoperative substitute in the form of the Convention, which gives them no right of recovery but is employed to limit the compensation contemplated by the laws of Portugal. Such procedure is entirely unjustified and is in direct conflict with the long recognized doctrine that the *lex loci* controls the right of recovery and the measure of damages.

Approaching the matter from another viewpoint, if the Convention is intended to have the effect of a "limitation of liability statute", analogous to the Federal Limitation of Vessel Owner's Liability Statute, Rev. Stat., Sec. 4283, Title 46 U. S. C. A., Sec. 183, then it is wholly ineffective until the Congress of the United States, the sole legislative authority with respect to foreign commerce, enacts the necessary legislation. The result of the failure of Congress to enact such measures is discussed further under Point V of this brief.

In adopting the Limitation Statute (Rev. Stat. 4283), Congress exercised its power to regulate commerce, as well as its prerogative over admiralty jurisdiction. It acted under constitutional mandate. *Old Dominion S. S. Co.* v. *Gilmore*, 28 S. Ct. 133, 134, 207 U. S. 398; *Providence & N. Y. S. S. Co.* v. *Hill Manufacturing Co.*, 3 S. Ct. 379, 109 U. S. 578. The President of the United States has no such power; and it is incorrect, therefore, to hold, as did the Appellate Division, that there is any proper analogy between the Limitation Statute and the Convention.

POINT III.

The President of the United States may not grant immunity to one United States citizen, as against another, with respect to torts committed in one foreign jurisdiction, by treaty or convention with other third party nations. To so employ the treaty-making power is repugnant to American institutions and a perversion of that power under the Constitution.

Careful research fails to disclose a single instance in which the provisions of a convention between the United States and a group of other nations, in the absence of legislation by the Senate and House of Representatives making such provisions specifically controlling, have been construed by the courts as being applicable or invokable in controversies between American citizens involving rights accruing in the territory of a power not party to such convention.

As the United States Supreme Court clearly held in the case of *Skiriotis* v. *State of Florida*, 313 U. S. 69, United States citizens are not governed by treaties, except in those instances where nationals of other nations with which this country has a treaty are involved. The sole sources of law, in so far as American citizens alone are concerned, are the statutory enactments of the Congress of the United States and, of course, of the legislatures of the several States.

It is manifestly improper for an American citizen, or a corporation organized under the laws of a State, to claim immunities under a treaty when another United States citizen asserts a claim against such person or corporation in the domestic courts based

on a right created by a foreign sovereign with which the United States has no treaty.

The doctrine of "government by convention" is a dangerous one. In so far as matters of national moment are concerned, if the practice of legislation by convention were to be countenanced, the Constitution would necessarily have to be abrogated and the powers conferred thereby upon the House of Representatives withdrawn. There are few situations with respect to which, under one pretext or another, conventions could not be entered into. If, as has here been held in the decisions of the New York courts, such conventions, as the laws of the land, take precedence over long established public policy and Federal and State laws, this will cease to be a representative government, and the American people must henceforth prepare to be governed not through their representative legislatures, but only by the President, subject to the "advice and consent" of two-thirds of the Senators who may, on a particular occasion, be present.

Such procedure would clearly violate the letter and spirit of the Constitution and be utterly irreconcilable with the American concept of Government. If the Congress should decide that American aviation is to be subsidized at the expense of the American traveling public or, more properly, of surviving next of kin, then only the Congress is competent to enact the laws which will produce that result. *Patterson* v. *Bark Eudora*, 190 U. S. 169, 176. If, as the opinion of the Appellate Division here suggests, it has become our national policy to confer practical immunity on common carriers by air, irrespective of the gravity of their negligence, and if it has become the public policy of the United States to impose that procedure

on the rest of the world, a step of such far-reaching consequences should be taken only in accordance with the deliberate decision of the representatives of the sovereign American people, the Congress of the United States.

If this Convention, which the Government of the United States had no part in framing, and which would impose on American citizens the same standards as those deemed appropriate by the European powers who concurred in its development, is properly construable as arbitrarily fixing the value of an American life at $8,291.87, the United States' adherence to it, under the guise of the exercise of the treaty-making power, is a perversion of that power. That is particularly true where such a construction of the Convention operates to annul a right of action created in favor of American citizens by the Republic of Portugal, which has steadfastly refused to adhere to the Convention or to permit persons injured in its territory to be made subject to its provisions.

It is significant that Article 1, Section 8, Clause 3 of the Constitution, in enumerating the powers of Congress, conferred the right to regulate interstate and foreign commerce in advance of the right to declare war. If the Chief Executive may, by recourse to a convention, arrogate to himself this power expressly and exclusively reposed in the Congress of the United States, it would follow that, by means of a similar device, the President could place this country in a state of war without the concurrence of the House of Representatives; and the same is true of all the other powers conferred jointly upon the Houses of Congress. The treaty-making power was never envisaged by the founding fathers as a device by which the President, with the advice and

consent of a limited number of Senators, might bypass the House of Representatives and effect legislation binding on all the citizens of the United States in respect of matters specifically delegated to the joint action of the Senate and the House.

In their *vis-a-vis* relationships and personal enterprises, American citizens cannot claim immunities under a treaty any more than they can assert special privileges thereunder. This is a Government of laws and not of men; and from the Federal viewpoint, the only competent law-making agency in situations where American citizens alone are involved is the Congress of the United States.

The history of American jurisprudence affords no parallel to this case, in which a Convention between certain foreign powers, later adhered to by the United States, has been construed as the controlling law in purely personal litigation between citizens of the United States domiciled in New York, and a corporation organized under the laws of New York and maintaining its principal place of business in this State, involving a tort committed within the territory of a nation not a party to such Convention.

The effect of this decision is that the President, in the exercise of the treaty-making power, may prescribe rules of liability applicable to actions brought in the courts of the respective States with respect to torts committed within the territorial limits of a foreign friendly power, not a party to any treaty with the United States, with the result that a right of action created by such foreign sovereign is denied recognition, limited or annulled. That theory is wholly foreign to the American system of government. The Government of the United States does not confer rights or impose obligations on American

citizens, *inter se,* by means of a treaty. If rights are to be bestowed or liabilities imposed on United States citizens, those results can be accomplished only through the enactment of legislation by the Congress of the United States, the sole depository of the law-making power.

It is axiomatic that United States citizens acquire no rights against other United States citizens by virtue of any treaty made by the United States; and that is particularly true in intranational private relations between American citizens in the courts of the several States. A case directly in point is *Skiriotis* v. *State of Florida,* 313 U. S. 69, where this court rejected the contention that an American citizen might invoke a treaty entered into by the United States with Spain, as a defense in a proceeding in an American court. Mr. Chief Justice Hughes there said:

> "Appellant (defendant) also relied upon numerous treaties of the United States, including the Treaty with Spain of February 22, 1919, and the treaties with several countries, signed between 1924 and 1930, inclusive, for the prevention of smuggling of intoxicating liquors. * * *
>
> The first point of inquiry is with respect to the status of appellant. * * * Appellant has not asserted or attempted to show that he is not a citizen of the United States, or that he is a citizen of any State other than Florida, or that he is a national of any foreign country. * * *
>
> In the light of appellant's statements—we are justified in assuming that he is a citizen of the United States and of Florida. Certainly appellant has not shown himself entitled to any greater rights than those which a citizen of Florida possesses. * * *

> For the same reason, none of the treaties which appellant invokes are applicable to his case. He is not in a position to invoke the rights of other governments or of the nationals of other countries."

It is clear, therefore, in the face of the foregoing pronouncement, that a citizen of the United States, or a corporation formed under the laws of a particular State, cannot acquire, through a treaty, privileges or immunities invokable against another United States citizen in litigation in the State courts.

POINT IV.

The Congress of the United States is exclusively vested with the power to regulate foreign commerce; and to the extent that the Convention purports to control the rights and liabilities of passengers and carriers in international travel, it is an usurpation of the power of Congress in violation of Article 1, Section 8, Clause 3 of the United States Constitution.

By adherence to the Convention and acquiescence in its provisions, according to the New York courts, the President has incorporated into the laws of the United States a new code governing American common carriers by air engaged in international transportation. International transportation is foreign commerce; and the action of the Executive in this regard, without the concurrence of the House of Representatives, is an usurpation of the power of Congress and a violation of Article 1, Section 8, Clause 3. This court, in *Board of Trustees* v. *United States*, 289 U. S. 48, considering the power of Congress "to reg-

ulate commerce with foreign nations", proclaimed that power to be "exclusive and plenary". If that be so, and under the explicit wording of the Constitution it is manifestly so, the Executive, whether under the guise of the treaty-making power or otherwise, cannot arrogate to himself the right to act in a field exclusively reserved to the Congress and appropriate a power properly exercisable only by the concurrent action of both Houses. To hold otherwise is to countenance nullification of the power of the House of Representatives in the important field of foreign commerce, and to disregard the clear interdict of the Constitution. The treaty-making power may not be used to do that which the Constitution forbids. *Geoffroy* v. *Riggs*, 133 U. S. 258, 267. Nor may a treaty "arbitrarily cede away any one right of a State, or of any citizen of a State". *Norris* v. *City of Boston*, 7 How. (U. S.) 283. In the case last cited it was said, at page 506:

> "This provision of the Constitution, it is to be feared, is sometimes expounded without those qualifications which the character of the parties to that instrument, and its adaptation to the purposes for which it was created, necessarily imply. Every power delegated to the Federal government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were, either in intention or in fact, ceded to the general government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. *Treaties in order to be valid, must be made within the scope* of the same powers;

for there can be no authority of the United States, save what is derived mediately or immediately and regularly and legitimately, from the Constitution. *A treaty no more than an ordinary statute* can arbitrarily cede away any one right of a State, *or of any citizen of a State.*" (Italics ours.)

The precise issue was determined in *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 203, 204, where the Supreme Court said:

"Commerce among the States consists of intercourse and traffic between their citizens and includes the transportation of persons and property * * * The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged * * * Congress alone, therefore, can deal with such transportation * * *."

The President may not lawfully usurp that power, and Congress may not abdicate it to him. *Panama Refining Co.* v. *Ryan,* 293 U. S. 394. While Congress may invest the President with discretion (*Marshall Field* v. *Clark,* 143 U. S. 649), it has not done so in this case.

Again, in *Robbins* v. *Shelby Taxing Dist.,* 120 U. S. 489, 492, 493, the Supreme Court said:

"1. The Constitution of the United States

having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive * * *

2. Another established doctrine of this court is, that where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; * * *"

"It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all subjects of foreign and inter-State commerce, the persons engaged in it, and the instruments by which it is carried on. * * *

The power to prescribe these and similar regulations necessarily involves the right to declare the liability which shall follow their infraction."

As stated in *Sherlock* v. *Alling*, 93 U. S. 99, 103, 104, where Congress does not act, as is here the case, then the rule is clear that no other agency of government may appropriate the power Congress has declined to exercise.

POINT V.

The Convention is an executory instrument and is incapable of application as a rule of law in the absence of legislation by Congress rendering it effective.

The Convention purports to create a limited right of recovery in the event of death or personal injury of a passenger. Where the carrier is negligent, it limits its liability to $8,291.87. Where the carrier

can prove freedom from negligence, the Convention absolves it of liability. The fact of the matter is, however, that in *Wyman* v. *Pan American Airways, Inc.*, 181 Misc. 963, aff'd 267 App. Div. 947, aff'd 293 N. Y. 875, the court, in construing the Convention, held that "no new substantive rights were created by the Warsaw Convention". In *Choy* v. *Pan American Airways, Inc.*, 1941 A. M. C. 483 (not officially reported), the United States District Court, Southern District of New York, expressly found that the Convention is inoperative, saying:

> "Nor do we think the claim under the Warsaw Convention should be insisted upon. There is no enabling act vesting the ownership of the cause of action stated by the Warsaw Convention nor even stating who may be thought to be injured by a death and, though the liability stated in Article 17 is part of the treaty which was adopted, we do not understand how it can be defined or enforced without statutory assistance, which it has not as yet received."

While, as was held in *Foster and Elam* v. *Neilson*, 2 Peters (27 U. S.) 253, some treaties do not require implementing legislation to render them effective, the principle is generally recognized that where a treaty is incomplete, it cannot be regarded as a rule of law until the deficiency is supplied by Congressional action. *Cameron Septic Tank Co.* v. *Knoxville*, 227 U. S. 39; *Robertson* v. *General Electric Co.*, 32 F. (2d) 495, certiorari denied 280 U. S. 571.

In the instant case, the Convention signally fails to specify the parties entitled to assert a claim thereunder in the event of death, makes no provisions for distribution among the next of kin, and fails to

differentiate between degrees of injury. For those reasons, *inter alia,* the District Court rejected it in *Choy* v. *Pan American Airways, Inc., supra.*

Great Britain, although one of the original signatories to the Convention, found it necessary in 1932 to supplement the deficiencies of the document by enacting the "Carriage by Air Act, 1932", Halsbury's Statutes of England, Vol. 25, p. 865. Although the Act incorporated the Convention verbatim, Parliament was compelled to adopt a supplemental schedule of detailed legislation in order to permit the application of the Convention by the courts.

Furthermore, as pointed out in "The Extent and Limitation of the Treaty-Making Power under the Constitution", 1 A. J. I. L. 636, 654-655 (*supra*), in view of the fact that the Convention purports to deal with powers delegated by the Constitution exclusively to Congress, it is incomplete without Congressional sanction, which it has not received. Consequently, it furnishes no law of which the courts can take cognizance, and its provisions are wholly ineffective.

CONCLUSION.

For the foregoing reasons, a writ of certiorari should be granted in this case.

Respectfully submitted,

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